Supreme Court, U.S.
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Case No. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

HOWARD L. BOERS and DONNA M. BOERS; and MICHAEL S. BOERS AND DANA R. BOERS,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA, and RICHARD SMILLEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

I.

DOES A STATUTE OF LIMITATIONS BEGIN RUNNING WITH KNOWLEDGE OF BOTH THE INJURY AND ITS CAUSE?

II.

DOES A STATUTE OF LIMITATIONS RUN WHEN THE CONDUCTS OF A CONTINUING NATURE WHICH HAS NOT YET ENDED?

III.

IS RICO ACTIONABLE AGAINST THE FEDERAL GOVERNMENT?

IV.

IS THE PRIVACY ACT ACTIONABLE AGAINST THE FEDERAL GOVERNMENT?

V.

IS THE TORT OF BAD FAITH ACTIONABLE AGAINST THE FEDERAL GOVERNMENT?

VI.

MAY ONE WITHDRAW A WAIVER OR ADMISSION AS A MATTER OF RIGHT BEFORE ANY RULING IS MADE ON SUCH WAIVER OR ADMISSION?

VII.

SHOULD ONE'S RIGHTS DEPEND UPON ONE'S ABILITY TO SECOND GUESS A JUDGE?

VIII.

SHOULD A JUDGE SHOULD BE ABLE TO DISMISS DEFENDANTS, OR CAUSE OF ACTIONS A MOTION OR NOTICE AND A CHANCE TO RESPOND, OR WITHOUT ANY STATED JUSTIFICATION?

IX.

MAY A JUDGE IGNORE THE CASE LAW OF THIS SUPREME COURT AND OF THE CIRCUIT WHEREIN HE/SHE SITS?

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REPORTS OF LOWER COURTS

No reports have been made in this case *per se*.

A ruling was made by the trial judge and filed on June 16, 1992. This ruling dismissed the complaint on the grounds that Plaintiff failed to plead with sufficient specificity under F.R.C.P. 9(b). The Court gave no opportunity to amend. No prior amendments to the complaint had been made.

The Ninth Circuit Court of Appeals also made a ruling which was filed on May 2, 1994. This ruling affirms the lower court and relies primarily on the fact that no leave to amend was requested until the Court held that the pleadings were insufficient.

JURISDICTION

The date of the entry of the judgment or decree sought to be reviewed; was May 2, 1994. The petition for re-hearing was filed on May 16, 1994. Denial of the rehearing was entered on May 31, 1994.

This action is brought against the government of the United States and the Department of Agriculture and an individual for

violation of the Federal RICO statutes (18 USC Section 1964 (c) and 28 USC Section 1331 and 18 USC Section 1961 et seq.), for violation of the Federal Privacy Act (5 USC Section 550 et seq.), and for breach of the covenant of good faith and fair dealing. All of these violations arise out of dealings with the Farmers Home Administration under the direction of the Department of Agriculture. The Case was dismissed after a motion to dismiss at the outset of the case. Appeal is taken from the judgment entered June 16, 1992.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

Constitutional Amendment 5

Constitutional Amendment 14

5 USC § 550 et seq.

18 U.S.C. § 1961 et seq.

STATEMENT OF THE CASE

In the 1950's and 1960's the State and Federal governments jointly sprayed the subject property with DDT. The DDT residue in the soil (DDE) is picked up in alfalfa production. When the alfalfa is fed to dairy cows, the DDE appears in the milk and renders it unusable. This substantially impacts profitability of a dairy ranch.

In late 1969 the County Extension Service Agent informed the then owners of the subject property, Mancuso, that their ranch was infested with a microscopic insect (Stem Nematode) which destroys alfalfa. Alfalfa was the primary crop of the subject property. As a result their was insufficient alfalfa for the farm store sales and the operation was unprofitable. By 1979 this condition had caused the Mancuso's to be delinquent on their FmHA loan for several years. In 1980 Mancuso's were still unable to run a profitable ranch even though their FmHA annual payment was only $3,206.

In 1980 and 1981, based upon the strong advice of FmHA, Petitioners, herein "Boers," applied for FmHA loans to purchase

and operate the subject property. Though the government had sprayed the DDT; and though FmHA inspected the property for the Boers prior to purchase, none of the above mentioned problems were disclosed by FmHA. FmHA scheduled the Boers annual payment at $97,100 (thirty times that of Mancuso). Gradually the Boers began learning of these problems form their own experience. They learned that the milk contained DDE but they didn't know where it was coming from. The dairy operation suffered financially. Eventually, plaintiffs suspected that the Mancuso's had breached their duties of disclosure and filed suit. Boers did not know of the FmHA involvement until the suit came to trial in September of 1987.

With this knowledge, Boers began investigating FmHA's handling of their loan and discovered many facts which point to mishandling of the loan over the years. Boers learned, for example, that improper loan decisions had been made on inaccurate financial information. They learned that FmHA had been incorrect many times on the availability of funding. They learned that loans had been improperly denied or delayed. These things they learned after

they began investigating the information first obtained at the Mancuso trial in September 1987. The misdeeds mentioned occurred throughout the entire time that the Boers have worked with the FmHA and continue beyond 1987. A tort claim was filed within two years on July 25, 1989. Said tort claim was denied January 24, 1991. This action was filed within six months on June 17, 1991.

The Tort Claim case is referred to herein as the "Negligence case." Certain of the misconduct was clearly intentional. The misconduct caused problems for the Boers at the time and continue to cause problems for the today. Therefore, they filed a separate action alleging violations of the RICO, Privacy Act, and Bad Faith laws on July 8, 1991. The second action is referred to as the "RICO case." The RICO case named the Department of Agriculture, and an individual, Richard Smilley. After numerous extensions, the government answered both complaints in December 1991.

The case was then plagued by an amazing number of procedural mishaps. On January 27, 1992 the U.S. filed a short motion to dismiss in the Negligence case based on their assertion

that a department (the Department of Agriculture) of the United States government could not be sued. These pleadings were sent to the wrong address and were not received by the Boers or counsel. The same thing happened with two other motions filed by the U.S. Attorney on January 29th and 31st of 1992. The motion of January 29, was based primarily on sovereign immunity. It contained a paragraph at the back of the motion on the statute of limitations but the main thrust of the motion was the statute of limitations. This motion was not filed in the RICO case. The motion of January 31, was filed in the RICO case. It argued sovereign immunity and lack of subject matter jurisdiction. It contained a short argument on sufficiency of the pleadings.

During this same time, on January 29, 1992, the U.S. also made a motion that the RICO case be transferred to Judge Copple who had the Negligence case. When the U.S. Attorney's office had all these motions returned to them by the postal service, undelivered, they sent them out again later. The motion for transfer was granted without the Boers ever knowing that the motion had been made. In March, when the Boers were preparing their reply

to these motions, counsel telephoned the court to inquire concerning local rules. As part of this conversation, counsel was informed by the Clerk's office that the case had been consolidated and that all pleadings should bear the case number of the Negligence case. Thus, counsel filed a response to all motions in one pleading and under one case number. This explains why the Court's ruling indicates that the motion was "unopposed." The motion was vigorously opposed but the pleading was filed in the Negligence case (as directed by the Court Clerk). The Court seems to have compensated for the problem because it refers to the brief in its order. Note that no motion addressed the cause of actions for violation of the Privacy Act, or Bad Faith. Also, the individual defendant, Richard Smilley, did not join in these motions.

After all of the pleadings had been filed, the Court decided the motions on June 16, 1992. The courts ruling in the Negligence case was based primarily upon its conclusion that the two year statute of limitations had run, and that the conduct complained of was intentional as a matter of law, rather than negligent, and therefore could not fall within the preview of the Federal Tort

Claims statute. The Court's ruling in the RICO case was based upon its conclusion that there was not enough specificity given in the pleadings. The Court provided no opportunity to amend. None had been requested because the counsel believed that the pleadings were properly drafted and had no way of knowing that the court would disagree.

The Court's decision is puzzling with respect to the other cause of actions for Privacy and Bad Faith, and with respect to the individual defendant. The Court simply decides the RICO issue, and then makes the statement that, "There remaining no other defendants or causes of action, the Clerk shall enter judgment accordingly." Thus, the entire case was dismissed with no explanation given for the dismissal of the non-moving defendant, nor of the dismissal of the other cause of actions.

Because the suits were filed in Arizona and the Boers counsel was in Idaho, the Court's ruling did not arrive at the office of Boer's counsel until the time for reconsideration had nearly expired. Counsel promptly filed a motion and filed the supporting memorandum two days later. The motion also requested leave to

amend. No ruling of any kind was ever rendered on this motion Appeal was taken on August 13, 1992. The Ninth Circuit remande to the Trial Court for a ruling on the reconsideration motion but th Trial Court replied that it had no motions before it. The Nin Circuit's ruling notes that the reconsideration was "arguab untimely."

The appeal was briefed and argued. A ruling was made o May 2, 1994 affirming the lower court. This ruling concludes th the Trial Court properly dismissed the Privacy and Bad Faith cau of actions because the statute of limitations had run (even thoug there was no motion to dismiss the cause of actions). It affirms th dismissal of RICO because counsel did not move for leave to amen **prior** to the Court's ruling that such was necessary. They als mentioned that they could not perceive of any way that th complaint could be amended to state a RICO claim. The Boe requested a rehearing. This was denied on May 31, 1994. A Wr of Certiorari for review in this Court is now requested.

ARGUMENT

I.

THE STATUTE OF LIMITATIONS BEGINS RUNNING WITH KNOWLEDGE OF BOTH THE INJURY AND ITS CAUSE

The appellate court presumed that the Privacy Act and Bad Faith cause of actions were dismissed because of the Court's ruling that the tort statute of limitations had run. This ruling was incorrect. There was not even a motion to dismiss the Privacy Act or Bad Faith cause of actions. Nevertheless, the statute of limitations had not run.

The Trial Court's decision did not challenge the use of the date of discovery as the proper accrual date for the statute of limitations. The Court's ruling was proper in this regard. The discovery rule as to accrual is not limited to medical malpractice cases; rather, any Plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule. *Stoleson v. U.S.* (C.A. Wis. 1980) 629 F.2d 1265. It's application is particularly appropriate in the instant case where we are alleging professional negligence and where the injury and

cause are very difficult to ascertain. Because of these special circumstances, the plaintiff here is not on an equal footing with the typical plaintiff. This point was made in the Ninth Circuit case of *Swine Flu Products Liability Litigation* (1985) 764 F.2d 637, at 639, as well as in *Dyniewicz v. U.S.* (1984) 742 F.2d 484, relied upon by this court.

Two United States Supreme Court decisions control accrual of the statute of limitations under the FTCA (Federal Tort Claims Act). In *Urie v. Thompson* (1949) 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282, the Supreme Court held that a claim under the Federal Employer's Liability Act did not accrue until the plaintiff's injury manifested itself. The Supreme Court declined to hold that his condition was "unknown and inherently unknowable." Instead, they held that because of his "blameless ignorance" of the fact of his injury, his claim did not accrue until his disease manifested itself.

United States v. Kubrick (1979) 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 cites *Urie v. Thompson*, *supra*, with approval. The lower Courts had basically held that for an action to accrue, there had to be knowledge of 1) the injury, 2) its cause, and 3)

blameworthiness (legal right to sue). The essences of this Supreme Court decision is that it is not a prerequisite to accrual of the statute of limitations that the victim know that he/she has been legally wronged. Blameworthiness is not required.

Kubrick makes it very clear that the critical factors are injury and causation. Knowledge of these two factors are required for accrual of the statute of limitations. The Court suggests that knowledge of "who" caused the injury may also be a factor but this point is ambiguous and has not been followed by subsequent lower court decisions. The Supreme Court recognized several conditions which are applicable in the instant case. First, that an injury may be "unknown or unknowable." The Supreme Court did not make the assumption that because their had been an injury, that it would necessarily be known to the plaintiff. Indeed, reasonable diligence may not uncover the injury. The Supreme Court also highlights the fact that knowledge of causation may be "unavailable to the plaintiff or at least very difficult to obtain." The unequivocal implication is that so long as causation is unknown, the statute will not begin to run.

Dyniewicz v. U.S. (9th Cir. 1984) 742 F.2d 484, clarifies that knowledge of "who" caused the loss is unimportant. The only considerations are"injury" and "cause." The Court further defined "cause" to mean the "immediate physical cause of the injury." Hence, the statute of limitations does not begin to run until the "cause" of the injury is discovered, not simply when the "injury" is discovered. Further, the analysis of the "cause" of the injury must be limited to the most "immediate" cause, and not subsequent causes or events resulting later down the chain of causation.

II.

THE STATUTE OF LIMITATIONS DOES NOT RUN WHEN THE CONDUCT IS OF A CONTINUING NATURE WHICH HAS NOT YET ENDED

This Supreme Court has stated that the statute of limitation for RICO is four years. *Agency Holding Corp. v. Malley-Duff & Assocs.* 483 U.S. 143 (1987). So long as the last act falls within that period, the statute states that the second act may occur as long as ten years earlier. 18 U.S.C. § 1961(4). The Court did not address the question of when a RICO claim accrues. RICO claims have commonly said to accrue when the plaintiff knew or should have known of the wrongs or injuries. The timing of the last predicate act has also been relied upon to determine the accrual of the claim. *Moll v. U.S. Life Title Ins. Co* 654 F.Supp. 1012 (S.D.N.Y. 1987); *County of Cook v. Berger*, 648 F.Supp. 433 (N.D. Ill. 1986). It therefore stands to reason that when the wrongful acts and the injuries are continuing, as in the instant case, the running of the statute of limitations will continue as well. The rule was expressed in *Bankers Trust Co. v. Feldesman*, 648 F.Supp. 17 (S.D.N.Y. 1986). Under the continuing violations doctrine, an

action is timely so long as the last act evidencing the continuing practice falls with the limitation period. When this test is met, relief will be granted with respect to earlier acts that would otherwise be time-barred. Thus, it cannot be said here that the statute of limitations has run. The predicate acts continue to this day.

III.

RICO MAY BE BROUGHT AGAINST THE FEDERAL GOVERNMENT AND ITS EMPLOYEES

The major thrust of the original motion was sovereign immunity. In holding that no cause of action was stated, the Court implies that sovergn immunity exists in this context. Several RICO cases have involved corrupt activity of public officials. The real question here is whether the Federal Government or a subdivision thereof may be a RICO defendant. The cases dealing with this issue hold that a governmental unit is an enterprise within the meaning of the RICO statute. Only one District has held to the contrary. See *United States v. Brown* 555 F.2d 407 (5th Cir. 1977); *United States v. Frumento* 563 F.2d 1083 (3rd Cir. 1977); *United States v. Altomare* 625 F.2d 5 (CA 4 W.Va., 1980). "In fashinion federal

principles to govern areas left open by Congress, our function is to effectuate congressional policy." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979).

From a policy standpoint, the need to remove racketeering activity from government is as great or greater than the need to remove racketeering from private business. Corruption within government does more to undermine democracy and public confidence than corruption of private business. Counsel for Boers mistakenly withdrew the RICO cause of action but then moved that its withdrawal be withdrawn a few days later and well in advance of any ruling by the Court. The Court specifically denied this request without explanation.

IV.

THE TORT OF BAD FAITH MAY BE ALLEGED AGAINST THE FEDERAL GOVERNMENT

In holding that no cause of action was stated, the Court implies that Bad Faith may not be alleged against the Federal Government. The opposite holding was reached in *Love v. United States* 915 F.ed 1242 (9th Cir. Mont. 1989).

V.

ONE'S RIGHTS SHOULD NOT DEPEND UPON ONE'S ABILITY TO SECOND GUESS A JUDGE

Every complaint filed is subject to the F.R.C.P. 8(a) requirement that the pleadings be a "short and plain statement of the claim." In a RICO claim, this must be balanced with F.R.C.P. 9 which requires specificity. No plaintiff can know in advance whether his or her pleading will properly balance these two rules. Even an experienced practitioner will find that the standard changes somewhat from one judge to the next. In *Wade v. Hopper*, 993 F.2d 1246 (7th Cir. 1993) the plaintiff was scolded for not providing a "short and plain statement of the claim." Ibid., at 993 F.2d, at 1249. For this reason, whenever a judge finds that a complaint is deficient, common notions of due process, substantial justice and fair play compel that judge to notify the plaintiff of his/her finding **before** dismissing the case -- not at the moment of dismissal, as occurred in this case. The counsel need not bring a motion to amend. The counsel doesn't even know there is a problem with the pleadings. If the counsel suspected there was a

problem with the pleadings they would have been changed before filing the complaint. No complaint should be dismissed for want of specificity unless there has first been given some notice of the defect and an opportunity to satisfy the judge's requirements. Attorneys are not mind readers.

The issue could be framed in terms of Fifth and Fourteenth Amendment due process. Due process of law is one of the basic pillars of our democratic society. We, the people, give our consent to be governed by this Federal Government because we trust that we will be afforded that due process of law. Normally, we assume that if a claim is has been filed into the court system, due process will automatically be satisfied. We trust our court system to champion the principles of due process. This makes a breach of that trust all the more serious. It threatens the very trust which is the fabric of our government. Where is the due process when a judge imposes the most serious sanction, dismissal, and does so with no notice, warning, or hearing on the subject?

Here, a motion to dismiss was filed. The motion was made by the government defendant only -- not by the individual

defendant. This judge then dismissed the entire case based upon insufficient allegations for the RICO claim. Never mind that there were two other non-RICO claims alleged. Never mind that in doing so he dismissed the case against the individual defendant who had not even joined in the motion. Again, where is the due process? The first clue counsel had that such a ruling was forthcoming was when he read the decision and dismissal.

Plaintiff notes that the Court of Appeals made a gratuitous comment that they could "not perceive any basis for a meritorious RICO claim..." While it is a legal maxim that the law does not require a frivolous act, plaintiff respectfully argues that her rights should not depend upon the extent of a judge's imagination. This comment suggests that if we had had a creative judge on the court who could imagine the facts plaintiff knew to be true, we would have been fine. Judges should not be required to be mind readers either.

Here, despite the judges inability to imagine such facts, the facts do support a RICO claim. Plaintiff has conclusive proof that her documents were altered by the government without her consent

to show false information and that those altered documents were then used against her. Plaintiff has conclusive proof that the government intentionally falsified the payment records of Michael Boers and then foreclosed on Michael Boers for non-payment. Plaintiff has conclusive proof that the government sent ordinary correspondence to a correct address and all legal correspondence which was subject to time deadlines to a wrong address so as to delay or avoid its being received. Plaintiff has conclusive proof that the government falsely dated documents and then used those false documents against plaintiff to force her out of business. Plaintiff has conclusive proof that defendants erased vital information on records and documents and then used those documents against her to disqualify her as a borrower and force her out of business. Plaintiff has conclusive proof that the government fraudulently concealed information and that such fraudulent concealment substantially contributed to the demise of plaintiff's business. Plaintiff has conclusive proof that the government intentionally destroyed vital documents and evidence which the government knew

would be used by plaintiffs in this case and which the government had been specifically instructed to preserve.

Every one of the facts mentioned above was stated in the complaint. Every one of the facts mentioned above is expressly covered by the RICO statute. But still, the judge could "not perceive" of any facts which might be alleged to support the claim. The trial court did not say that no claim could be stated. It said that more specificity was needed: dates, times, places. Plaintiff can easily provide any degree of specificity desired. This is the ultimate question: degree. While the judge's opinion concern the degree of specificity is controlling, a party should not be thrown out of court for having a different opinion. The court should express its opinion, direct compliance, and then sanction if compliance is not forthcoming.

VI.

A JUDGE SHOULD NOT BE ABLE TO DISMISS DEFENDANTS, NOR CAUSE OF ACTIONS WITHOUT MOTION OR NOTICE AND A CHANCE TO RESPOND, NOR WITHOUT ANY STATED JUSTIFICATION IN THE ORDER OF DISMISSAL

Dismissing the government for want of specificity in plaintiff's RICO claim was unjust, but dismissing the other individual defendant, and the other cause of actions was outrageous. The judge totally ignored them. Plaintiff had sued an individual, Richard Smilley, and had alleged violation of the Federal Privacy Act, 5 U.S.C. § 550 *et seq*, and Bad Faith. *Love v. United States* (9th Cir. Mont. 1989) 915 F.2d 1242. His entire treatment of the two other cause of actions and of the individual defendant was as follows: "There United States; motion to dismiss the RICO count is hereby granted. There remaining no other defendants or causes of action, the Clerk shall enter judgment accordingly." When the inaccuracy of this statement was pointed out to the judge, he made no correction and has refused to rule on the motion. Thus, rather than face the issues involved with the individual defendant and the other cause of actions, the judge has rested on the original order

which falsely states that these issues do not exist. The arguments concerning due process and the erosion of trust in our legal system apply with even greater force to this situation. Not only are we expected to read the judge's mind concerning issues which have never been raised, but we are supposed to do so while he has his head in the sand and himself, pretends that the issues do not exist.

VII.

A JUDGE MAY NOT IGNORE THE LAW OF THIS SUPREME COURT AND OF THE CIRCUIT WHEREIN HE/SHE SITS

An insufficient allegation of fraud or mistake is subject to the liberal amendment provisions of Federal Rule 15. *Luce v. Edelstein* (2nd Cir. 1986) 802 F.2d 49. This is true with respect to RICO claims in the Ninth Circuit. In the Ninth Circuit case of *Schreiber Distributing v. Serv-Well Furniture Co.* (9th Cir. 1986) 806 F.2d 1393, it was an abuse of discretion to dismiss a civil RICO claim with prejudice absent a finding that amendment of the allegations could not possibly cure any deficiency. Substantially the same ruling was made in *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985).

This is true whether or not a request for leave to amend is made by Plaintiff. *Schreiber Distributing v. Serv-Well Furniture Co.* (9th Cir. 1986) 806 F.2d 1393; also see *Bank v. Pitt* (11th Cir. 1991) 928 F.2d 1108. Though leave to amend was specifically requested in Plaintiff's motion for reconsideration, no ruling was ever made on that motion. It is particularly important that no prior amendments had been made. See *Allen v. City of Beverly Hills*, 911 F.2d 367 (9th Cir. 1990).

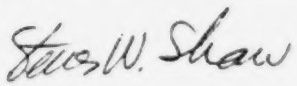
Here, an amendment would have cured any deficiencies in that that acts could have been made with more specificity. Further, even under the acts which were already plead, the case is not barred under the RICO statute of limitations which is interpreted differently than the statute for the FTCA. See *Rodriquez v. Banco Central* 917 F.2d 664 (1st Cir. 1990); *Moll v. U.S. Life Title Ins. Co.* 654 F.Supp. 1012 (S.D.N.Y. 1987); *Bankers Trust Co. v. Feldesman* 648 F.Supp. 17 (S.D.N.Y. 1986).

It is also proper, in a RICO case, to allow further discovery before rendering a decision on sufficiency of the pleadings as was requested by Plaintiffs in the instant case. See *Chambers Dev. Co.*

v. Browning-Ferris Indus. (D.C. Pa. 1984) 590 F.Supp. 1528. This is particularly true with respect to the individual defendant, RICHARD SMILLEY.

Dated: August 26, 1994

Respectfully Submitted:



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APPENDIX

Constitutional Amendment 5

No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall private property be taken for public use, Without just compensation.

Constitutional Amendment 14

Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2 Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3 No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to

support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

Section 4 The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5 The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

5 U.S.C. Section 551 et seq.

Section 551. Definitions

For the purpose of this subchapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the government of the District of Columbia; or except as to the requirements of section 552 of this title-

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title-

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641 (b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named o admitted as a party, or properly seeking and entitled as of right t be admitted as a party, in an agency proceeding, and a person o agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agenc statement of general or particular applicability ad future effe designed to implement, interpret, or prescribe law of policy o describing the organization, procedure, or practice requirements o an agency and includes the approval or prescription for the futur of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowance therefor, prices, facilities, appliances, services or allowance therefor or of valuations, costs, or accounting, or practices bearin on any of the foregoing;

(5) "rule making" means agency process fo formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a fina disposition, whether affirmative, negative, injunctive, or declarator

in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency-

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency-

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception' or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not

include requests for status reports on any matter or proceeding covered by this subchapter.

Section 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittal or requests, or obtain decisions;

(B) statements of the general course, and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when

incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying-

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for

public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if-

(i) it has been indexed and either made available or published as provided by this paragraph' or

(ii) the party has actual and timely notice of the terms thereof. -

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units os such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal

place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in care to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or

for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the

findings and recommendations to the officer or employee of his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1),(2), or (3) of this subsection, shall-

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause(ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request-

(i) the need to search for and collect the requested records from field facilities or other

establishments that are separate from the office processin
the request;

(ii) the needs to search for, collect, and appropriatel
examine a voluminous amount of separate and distinc
records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducte
with all practicable speed, with another agency having
substantial interest in the determination of the request o
among two or more components of the agency havin
substantial subject-matter interest therein.

(C) Any person making a request to any agency fo
records under paragraph (1), (2), or (3) of this subsection shall b
deemed to have exhausted his administrative remedies with respec
to such request if the agency fails to comply with the applicable tim
limit provisions of this paragraph. If the Government can show
exceptional circumstances exist and that the agency is exercising du
diligence in responding to the request, the court may retai
jurisdiction and allow the agency additional time to complete its
review of the records. Upon any determination by an agency to

comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are-

(1)(A) specifically authorized under criteria established by an Executive order to be dept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statue (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information

furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregated portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the

Senate for referral to the appropriate committees of the Congress. The report shall include-

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding

records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E),(F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term"agency" as defined in section 551(1) of this title includes any executive

department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

§552a. Records maintained on individuals

(a) Definitions.-for purposes of this section-

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term"maintain" includes maintain, collect, use, of disseminate;

(4) the term "records" means an item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term"statistical records" means a records in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term"routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) **Conditions of disclosure**.-No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual t whom the record pertains, unless disclosure of the record would be-

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a))7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator

of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governemental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentally has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; of

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of Certain Disclosures.-Each agency, with respect to each system of records under its control, shall-

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of-

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b)of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) Except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) **Access to records.**-Each agency that maintains a system of records shall-

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and-

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either-

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such

refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individuals to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing officials determination under subsection (g)(1)(A) of this section:

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.-Each agency that maintains a system of records shall-

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual-

(A) the authority (whether granted by statue, or by executive order of the President) which authorizes the

solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if nay, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include-

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such

accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person

with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguard to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of nay new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules.- In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall-

1(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record of information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each

individual t be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for an review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies.-Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any

determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably

incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g) (1)(B) of this section, the court may enjoin the agency from withholding the records and order the production t the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional

or willful, the United States shall be liable to the individual in an amount equal to the sum of-

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section the action may be

brought tat any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians.-For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(j)(1) Criminal penalties.-Any officer of employee of an agency, who by virtue of his employment of official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions.-The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553 (b)(1),(2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6),(7),(9),(10), and (11), and (i) if the system of records is-

(1) Maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to

apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigating, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553 (c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions.-The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1),(2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3),(d),(e)(1),(e)(4)(G), (H), and (I) and (f) of this section if the system of records is-

(1) subject to the provisions of section 552 (b)91) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, that if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be

held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would beheld in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) **Archival records.**- Each agency record which is accepted by the Administrator of General Services for storage, processing, and

servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency records pertaining to an identifiable individual which is transferred to the National Archives of the United States as record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors.-When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, of such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) Mailing lists.- An individual's name and address may not be sold or rented by an agency unless such action is

specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on new systems.-Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such other information as indicates efforts to administer fully this section.

(p) Annual report.-The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing fro each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions,

and such other information as indicates efforts to administer fully this section.

(q) **Effect of other laws.**-No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

§552b. Open meetings.

(a) For purposes of this section-

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term"meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or

disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest reburies otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this action to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to-

910 disclose matters that are (A) specifically authorized under criteria established by an Executive order

to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion o n the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only be the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life of physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would-

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to

make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion of peritonize of which are proposed to be closed to the public pursuant to subsection(c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with

respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and not proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5),(6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written

explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9) (A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1)l, (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, that the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of

the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible. and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs 91) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the person present,

shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting. or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9) (A), or (10) of subsectioı. (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll call vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency

determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete coy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States

District Court for the District of Columbia to require an agency to promulgate such regulations if such agency hasn't promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such

actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is one the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law,

inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the Plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of casts against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number

of agency meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any Individual any record, including transcripts,

recording, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

§553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved-

(1) a military or foreign affairs function of the United States; of

(2) a matter relating to agency management or personal or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall b e published in the Federal Register, unless persons subject thereof are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statement of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds(and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After

consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of substantive rule shall be made not less than 30 days before its effective date, except-

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule

§554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be

determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

(1) a matter subject to a subsequent trial of the law and the facts do novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of-

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for-

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not-

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply-

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

§555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public

business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirements of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpena authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

§556. Hearings; presiding employees; owners and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence-

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participation employee, the agency

shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may-

(1) administer oaths and affirmations;

(2) issue subpena authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but eh agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557 (d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly cause such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will

not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide

the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses-

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely

execution of its functions imperatively and unavoidable so requires.

(c) Before a recommended, initial, or tentative decision, or decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions-

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of-

(A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law-

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or

knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communication; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in

violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interest of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does to constitute authority to withhold information from Congress.

§558. Imposition of sanctions; determination of applications for license; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given-

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) Opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, al license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

§559. Effect on other laws; effect of subsequent statute

this subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5362, and 7521 of this title, and the provisions of section 5335 (a)(B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or other wise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent

statue may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301)2)(E), 5362, or 7521 of this title, or the provisions of section 5335 (a)(B) of this title that relate to hearing examiners, except to the extent to the extent that it does so expressly.

18 U.S.C. § 1961

Section 1961. Definitions

As used in this chapter-

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extorsion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection

with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State of local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1952 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and

2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501 (c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires a at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of

value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General

to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Section 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this

subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activates of which affect, interstate of foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization or any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court

may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegation so the criminal offense in any subsequent civil proceeding brought by the United States.

Section 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the

United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Section 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such coy, such judge shall designate immediately a judge of that district to hear and determine action.

Section 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

Filed: June 16, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HOWARD L. BOERS, et al.,	)	
	)	No. CIV 91-1068 PHX WPC
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM AND ORDER
	)	
DEPARTMENT OF AGRICULTURE, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

Currently pending before the Court is the Department of Agricultures's unopposed motion to dismiss itself as a named party and the United States' substantive motion to dismiss plaintiffs' civil RICO claims. The United States' motion has been fully briefed and oral argument was waived. The Court now rules on the pending motions to dismiss.

The Court notes at the outset that this action has been largely affected by this Court's ruling in a related case, Boers v.

Dept. of Agriculture, Civ. No. 91-967 PHX WPC, in which this Court held that that entire action was barred by the two-year statute of limitations period and was also barred by specific exemptions found within the FTCA. 28 U.S.C. Section 2680(h). Because of that ruling, the only remaining issue to be resolved in the instant action is whether a cause of action for civil RICO has been adequately alleged.

When this issue was raised in the United States' motion to dismiss, the plaintiffs, apparently after further review, stated that they "agree that RICO is not properly alleged against the government defendant." Furthermore, plaintiffs stated that they "hereby withdraw the RICO allegations so far as they relate to government defendants." See, Joint Response, p. 8. Then, on April 24, 1992, the plaintiff filed a "Motion to withdraw (that) portion of plaintiff's response." The United States filed an opposition to the withdrawal.

This Court concludes that the RICO count, as alleged, simply does not state a cause of action. The particularity requirements of Fed. R. Civ. p. 9(b) mandate that a RICO plaintiff

plead the time, place and manner of commission of the RICO predicate acts and the role of each defendant in each predicate act. Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393)9th Cir. 1986); Occupational-Urgent Care H. System v. Sutro, 711 F.Supp. 1016 (E.D. Cal. 1989).

In the present case, plaintiffs' RICO claims wholly fail to satisfy the Rule 9(b) pleading requirement. Based on the complaint, it is impossible to define what was allegedly done, when it was allegedly done, how it was allegedly done and precisely who allegedly committed any of the asserted predicate acts. Accordingly, the motion to dismiss will be granted in light of plaintiffs' failure to plead the RICO count pursuant to Fed. R. Civ. P. 9(b) and in light of plaintiffs' own withdrawal of the RICO allegations.

IT IS THEREFORE ORDERED:

(1) The Department of Agriculture's motion to dismiss is hereby granted. Local Rule 11(i).

(2) Plaintiffs' motion to withdraw portion of response is hereby denied.

(2) The United States' motion to dismiss the RICO cont is hereby granted. There remaining no other defendants or causes of action, the Clerk shall enter judgment accordingly.

DATED this 15 day of June, 1992.

/S/ William P. Copple
William P. Copple
United States District Judge

Filed: June 16, 1992

HOWARD L. BOERS, et al., Plaintiff, vs. DEPARTMENT OF AGRICULTURE, et al., Defendants.	No. CIV 91-0967 PHX WPC MEMORANDUM AND ORDER

Currently pending before the Court is the Department of Agriculture's unopposed motion to dismiss itself as a named party and the United States' substantive motion to dismiss. The United States' motion has been fully briefed and oral argument was waived. The Court now rules on the pending motions to dismiss.

The amended complaint asserts tort liability under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. Section 2671, et seq., on the basis of (1) the alleged failure of Farmers Home Administration ("FHA") and its employees to disclose to plaintiffs that their dairy ranch property had been sprayed with DDT and that the land was infected with stem nematode and (2) FHA's alleged

mishandling of their loans through inaccurate financial information, inaccurate information on loan availability and improper delay or denial of loans.

The threshold question raised in the pleadings which this Court must address is whether the statute of limitations has run on plaintiffs' cause of action. The FTCA sets forth a two-year statute of limitations for filing an administrative claim against the United States. Section 2401 (b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues...

The events giving rise to this lawsuit all occurred between 1977 and January 1987. Plaintiffs filed their administrative claim on July 25, 1989.

Plaintiffs contend that the statute of limitations period did not begin to run until September 1987, when they first learned of the actual causal connection between Federal governmental activities and their milk contamination. Upon a review of the amended complaint, this Court concludes that plaintiffs' position is

inconsistent with plaintiffs' own allegations in the verified complaint and amended complaint.

At paragraph 43, page 10 of the amended complaint, plaintiffs allege that they learned of the DDE contamination of their milk in August 1983 and at paragraph 20, page 5 and paragraph 38, page 9 of the complaint plaintiffs allege that despite the stem nematode infestation in the early 1980's, properly funded reseeding of the land could have produced a better crop.

In addition to plaintiffs' own inconsistent allegation concerning the accrual of the statute of limitations, it is undisputed that the time frames alleged in the complaint are from 1977 through January 1987. In the Ninth Circuit, a claim accrues at the time of plaintiff's injury despite ignorance of the involvement of the United States' employees. Dyniewicz v. United States, 742 F.2d 484 (9th Cir. 1984) Accordingly, this Court concludes that this entire action is time-barred by the applicable two-year statute of limitations.

Additionally, the Court notes that regardless of the time bar, the complaint is barred by the FTCA exemption for causes of action

alleging "misrepresentation" or "deceit." 28 U.S.C. Section 2680 (h).

These conclusions apply with equal force and effect to a companion case pending before this Court, Boers v. Dept. of Agriculture, Civ. No. 91-1068 PHX-WPC. The only remaining issue in the companion case is a RICO claim. That issue is the subject of another motion to dismiss and will be addressed in a separate order.

IT IS THEREFORE ORDERED:

(1) The Department of Agricultures' motion to dismiss is hereby granted. Local Rule 11(i).

(2) The United States' motion to dismiss is also granted. There remaining no other defendants or claims, the Clerk shall enter judgment accordingly.

DATED this 15 day of June, 1992.

/S/ William P. Copple
William P. Copple
United States District Judge

Filed: August 28, 1991

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HOWARD and DONNA BOERS,	)	CIV 91-1068 PHX-SMM
Plaintiffs,	)	ORDER
vs.	)	
DEPARTMENT OF AGRICULTURE and RICHARD SMILLEY,	)	
Defendants.	)	

I hereby recuse myself from any further action in the above captioned matter and order this case to be reassigned, by lot, to another Judge in the District of Arizona.

DATED this 23rd day of August, 1991.

/S/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

Copies to all counsel of record

Filed: November 18, 1991

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. BOERS and DONNA M. BOERS, husband and wife; and MICHAEL S. BOERS and DANA R. BOERS) husband and wife,	CIV-91-1068-PHX-EHC
Plaintiffs,	ORDER
vs.	
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA	
Defendants.	

Based upon defendants' motion for extension of time to answer or otherwise plead and good cause appearing therefore, it is

ordered that defendants' motion is hereby granted and their answer or other responsive pleading shall be filed in this action on or before December 13, 1991.

DATED this 15 day of November, 1991.

/S/
UNITED STATES DISTRICT JUDGE

Filed: November 21, 1991

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. HOERS and DONNA M. BOERS, husband and wife; and MICHAEL S. BOERS and DONNA R. BOERS, husband and wife,	)	CIV-91-967-PHX-WPC
Plaintiff,	)	ORDER
v.	)	
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA	)	
Defendants.	)	

Based upon defendants motion for extension of time to answer or otherwise plead and good cause appearing therefore, it is

ORDERED that defendants' motion is hereby granted and their answer or other responsive pleading shall be filed in this action on or before December 15, 1991.

DATED this 20 day of November, 1991.

/S/

Filed January 29, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. BOERS, et ux, et al.,	)	CIV-91-0967-PHX-WPC
Plaintiffs,	)	ORDER GRANTING DEFENDANTS' MOTION FOR EXTENSION OF TIME TO COMPLY WITH DISCOVERY
vs.	)	
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA,	)	
Defendants.	)	

Based upon defendants' unopposed motion and the Court finding good cause therein,

IT IS ORDERED that defendants' motion for a fifteen (15) day extension of time to comply with plaintiffs' discovery is hereby granted and defendants' response to said discovery shall be filed on or before February 18, , 1992.

DATED this 28 day of January, 1992.

/S/
UNITED STATES DISTRICT JUDGE

Filed January 30, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

HOWARD L. BOERS, et ux, et al.,	)	CIV-91-0967-PHX-WPC
Plaintiffs,	)	ORDER GRANTING DEFENDANTS' MOTION FOR EXTENSION OF TIME TO COMPLY WITH DISCOVERY
vs.	)	
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA,	)	
Defendants.	)	

Based upon defendants' unopposed motion and the Court finding good cause therein,

IT IS ORDERED that defendants' motion for a fifteen (15) day extension of time to comply with plaintiffs' discovery is hereby granted and defendants' response to said discovery shall be filed on or before February 19, 1992.

DATED this 28 day of January, 1992.

/S/
UNITED STATES DISTRICT JUDGE

Filed: February 21, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. BOERS and DONNA M. BOERS, husband and wife; and MICHAEL S. BOERS and DANA R. BOERS husband and wife, Plaintiffs,	CIV-91-967-PHX-WPC
v.	ORDER GRANTING DEFENDANTS' MOTION FOR EXTENSION OF TIME TO COMPLY WITH DISCOVERY
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA	
Defendants.	

Based upon defendants' unopposed motion and the Court finding good cause therein,

IT IS ORDERED that defendants' motion to extend time to comply with plaintiffs' discovery is hereby granted and defendants' response to said discovery shall be postponed until further order of this Court following the Court's disposition of defendants' two pending motions to dismiss.

DATED this 19 day of February.

UNITED STATES DISTRICT JUDGE

Filed: February 21, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HOWARD L. BOERS, et ux., et al.,	)	No. CIV-91-1068 PHX, EHC
Plaintiff,	)	ORDER
vs.	)	
DEPARTMENT OF AGRICULTURE, UNITED STATES OF AMERICA,	)	
Defendant.	)	

Pursuant to Government's motion, filed January 29, 1992,

IT IS ORDERED:

Government's motion to transfer the above-entitled case to the Honorable Wm. P. Copple for all further proceedings is granted.

DATED this 19 day of February, 1992.

/S/ Earl H. Carroll
EARL H. CARROLL
UNITED STATES DISTRICT JUDGE

Filed: February 28, 1992

Steven W. Shaw
Attorney at Law
155 South 2nd Avenue
P.O. Box 4727
Pocatello, Idaho 83201

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. BOERS and DONNA M. BOERS, husband and wife, and MICHAEL S. BOERS and DANA R. BOERS husband and wife,	)	CIV-91-1068-PHX-EHC
Plaintiffs,	)	ORDER GRANTING PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS
vs.	)	
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA,	)	
Defendants.	)	

BASED upon Plaintiffs unopposed motion and the Court finding good cause therein,

IT IS ORDERED that Plaintiffs MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS is hereby granted and Plaintiffs' response to said motion

shall be postponed until the 4th day of March, 1992.

SIGNED AND DATED this 27 day of February, 1992.

/S/
UNITED STATES DISTRICT JUDGE

Filed: February 27, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. BOERS and DONNA M. BOERS, husband and wife; and MICHAEL S. BOERS and DANA R. BOERS husband and wife, Plaintiffs,	CIV-91-1068-PHX-EHC
v.	ORDER GRANTING DEFENDANTS' MOTION FOR EXTENSION OF TIME TO COMPLY WITH DISCOVERY
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICAN, RICHARD SMILLEY, agent of DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA, RICHARD SMILLEY, individually, Defendants.	

Based upon defendants' unopposed motion and the Court finding good cause therein,

IT IS ORDERED that defendants' motion for an extension of time to comply with plaintiffs' discovery is hereby granted and defendants' response to said discovery shall be postponed pending

further order of this Court following the Court's disposition of the two pending motions to dismiss.

DATED this 24 date of February, 1992.

/S/
UNITED STATES DISTRICT JUDGE

Filed: March 27, 1992

Steven W. Shaw
LAW OFFICES OF WOOD & SHAW
155 South Second Avenue
Pocatello, Idaho 83201
Tele: (208) 234-1234

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. BOERS and DONNA M. BOERS, husband and wife; and MICHAEL S. BOERS and DANA R. BOERS) husband and wife,	CIV-91-1068-PHX-WPC
Plaintiffs,	ORDER GRANTING PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTIONS
vs.	
DEPARTMENT OF AGRICULTURE UNITED STATES OF AMERICA, ET AL.	
Defendants.	

BASED upon Plaintiffs unopposed motion and the Court finding good cause therein,

IT IS ORDERED that Plaintiffs MOTION FOR EXTENSION OF TIME TO RESPOND TO-MOTIONS is hereby

granted and Plaintiffs' response to said motions hall be postponed until the 18th day of March, 1992.

SIGNED AND DATED this 20 day of March, 1992.

/S/
UNITED STATES DISTRICT JUDGE

Filed: June 26, 1992

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

HOWARD L. BOERS, et al.,

Plaintiffs,

JUDGMENT IN A CIVIL CASE

v.

DEPARTMENT OF AGRICULTURE, et al.,

Defendants. Case No: CIV 91-1068-PYX-WPC

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED having granted the Department of Agriculture's motion to dismiss and having granted the United States' motion to dismiss the Rico count, plaintiff shall take nothing and the complaint and action are hereby dismissed.

_____ Richard H. Weare

Date Clerk

Al Larsen

(By) Deputy Clerk

Filed: June 16, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HOWARD L. BOERS, et al.,	
	CIV 91-0967 PHX WPC
Plaintiffs,	
	JUDGMENT
vs.	
DEPARTMENT OF AGRICULTURE, et al.,	
Defendants.	

This action came on for consideration before the Court, the Honorable William P. Copple, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs' complaint and action are hereby dismissed and that plaintiffs take nothing by their complaint. This judgment is in accordance with this Courts' order dated June 16, 1992, defendants' motions to dismiss.

Dated at Phoenix, Arizona, this 16th day of June, 1992.

RICHARD H. WEARE, Clerk

By: /S/ A.P. Juarez
A.P. Juarez, Deputy Clerk

cc: all counsel

Filed: May 2, 1994

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD L. BOERS, et al.,	)	
	)	No. 92-16508
Plaintiffs-Appellants,	)	
	)	DC No. CV-91-01068-WPC
v.	)	
	)	MEMORANDUM*[1]
UNITED STATES OF AMERICA, U.S. DEPARTMENT OF AGRICULTURE AND RICHARD SMILEY,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Arizona
William P. Copple, District Judge, Presiding
Argued and Submitted April 13, 1994
San Francisco, California

Before: SCHROEDER, D.W. NELSON, and CANBY, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Plaintiffs, Howard and Donna Boers and Michael and Dana Boers applied for and received an FmHA loan in order to purchase some property in Maricopa County in 1980 for a farm and dairy ranch. The plaintiffs' farming operation failed and the FmHA foreclosed on their loan in 1987. Plaintiffs' financial difficulties were caused by a combination of circumstances. First, their milk was contaminated by DDE that the government had sprayed between 1958 and 1966; second, their land was infested with stem nematode which destroyed plaintiffs' alfalfa crops; and third, some of plaintiffs' FmHA loans were delayed or denied, allegedly due to governmental negligence or intentional misconduct. The government was aware of both the DDE spraying and the stem nematode infestation at the time that the Boers purchased the land with the FmHA loan.

Plaintiffs brought an administrative claim in July 1989. After their administrative claim had been denied, plaintiffs filed one complaint (the "RICO complaint") against the United States, the United States Department of Agriculture, and Richard Smiley, the former Arizona director of the FmHA, alleging RICO, Privacy Act,

and FTCA claims. The Boers also filed a related negligence action against the United States and the United States Department of Agriculture under the FTCA (the "FTCA complaint").

The defendants answered both complaints, and the United States and the Department of Agriculture then filed a joint motion to dismiss plaintiffs' RICO claim, arguing that the claim was barred by sovereign immunity and that the complaint should be dismissed for failure to comply with the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure. While the Privacy Act and FTCA claims in the RICO complaint were not specifically mentioned, the United States had filed a separate motion to dismiss plaintiffs' FTCA complaint on the grounds that it was barred by the FTCA's two-year statute of limitations.

The district court granted the defendants' motions to dismiss on June 15, 1992. In its dismissal of the RICO complaint, the district court first incorporated by reference its separate disposition dismissing plaintiffs' FTCA complaint on statute of limitations grounds. This, apparently, was the basis for the district court's dismissal of plaintiffs' FTCA and Privacy Act claims. Next, the

court dismissed plaintiffs' RICO claim on the ground that "plaintiffs' RICO claims wholly fail to satisfy the Rile 9(b) pleading requirement." The court then announced that in light of these rulings, "there remaining no other defendants or causes of action, the clerk shall enter judgment accordingly."

Plaintiffs filed a Rule 59(e) motion to amend the judgment on June 19, 1992, the last possible day for filing such a motion. Plaintiffs then forwarded a Memorandum of Points and Authorities in support of that motion two days later, on July 1, 1992. This motion was arguably untimely, due to Local Rule 11 (b) which provides that "[u]pon any motion, the moving party shall serve and file with the motion papers, a memorandum . . . of [points and authorities]." Before the district court had ruled on their Rule 59(e) motion, plaintiffs filed the instant appeal in the RICO action [2] Before calendaring, a motions panel of this court remanded the case to the district court to determine whether a timely motion for reconsideration was pending. In response, the district court

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1 Plaintiffs do not appeal the dismissal of their FTCA complaint.

indicated that no such motion was before it. We therefore reach plaintiffs' claims on the merits.

I. FTCA and Privacy Act Claims

The district court dismissed the plaintiffs' FTCA and Privacy Act claims, reasoning that because the events giving rise to that lawsuit all occurred between 1977 and January 1987 plaintiffs' administrative claim, filed on July 25, 1989, had been untimely under the FTCA's two-year statute of limitations, See 28 U.S.C. Section 2401(b).[3] In so ruling, the district court rejected plaintiffs' contention that the statute of limitations had not begun to run until September 1987, when in the context of another suit, they first learned of the government's alleged negligence in handling their loan.

On appeal, plaintiffs, reiterate their argument that the discovery rule should be applied to toll the statute of limitations on their tort and Privacy Act causes of action until September, 1987, when they learned of the causal connection between the FmHA's

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3 The Privacy Act also contains a two-year statute of limitations. 5 U.S.C. Section 552a(g))5).

alleged negligent loan handling and the failure of their farm. They rely principally on cases applying the discovery rule to situations involving a physical injury or illness. In those cases, the courts held that the plaintiffs' actions did not accrue until both the "injury" and its "case" were known. See United States v. Kubrick, 444 U.S. 111 (1979) (plaintiff's cause of action accrued when he became aware of the link between his hearing loss and the treatment provided at a VA hospital); Rosales v. United States, 824 F.2d 799 (9th Cir. 1987) (medical malpractice claim accrued when plaintiff learned that her baby's retardation was cause by an IUD); Raddatz v. United States, 750 F.2d 791 (9th Cir. 1984) (medical malpractice claim accrued when plaintiff learned that the doctor's treatment had caused the infection of her already perforated uterus).

In holding that a cause of action does not accrue until a plaintiff knows of an injury's cause as well as the injury itself, however, these cases also make clear that "cause" refers to the actual physical cause of the injury, and not necessarily the negligent actions of a particular defendant. See Kubrick, 444 U.S. 111 (veteran's cause of action accrued when he learned of the link

between the antibiotic and his hearing loss, even though he did not at that time know that the administration of the drug had been improper and negligent); Dyniewica v. United States, 742 F.2d 484 (9th Cir. 1984) (plaintiff's cause of action accrued at the time of their parents' fatal accident, even though they did not know that negligence of government employees may have contributed to the accident).

The "injury" plaintiffs identify here is the loss of their farm, and attendant financial and emotional setbacks.[4] The cause of these injuries was a combination of the DDE spraying, the stem nematode infestation, and the lack of adequate and timely loan financing. Plaintiffs were well aware of all three of these causes well before September of 1987. The fact that they did not learn of the alleged negligence of the FmHA that contributed to their loan being financed despite the stem nematode infestation and perhaps caused the various delays in getting their loans funded did not toll the statute of limitations. See Dyniewicz, 742 F.2d 484.

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4 Plaintiffs allege no separate ascertainable Privacy Act.

II.RICO

The district court dismissed plaintiffs' RICO claim for failure to comply with the particularity requirements of Federal Rule of Civil Procedure 9(b). On appeal, the plaintiffs contend that (1) their complaint adequately pled RICO, and (2) the district court erred in dismissing their complaint without giving them an opportunity to amend.[5]

The district court correctly dismissed plaintiffs' RICO complaint for failure to comply with Rule 9(b). See Moore v. Kayport Package Exp., 885 F.2d 531, 541 (9th Cir. 1989). As the district court noted, "based on the complaint, it is impossible to define what was allegedly done, when it was allegedly done, how

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5 Plaintiffs also contend that the district court erred in denying their motion to withdraw that portion of their response to the defendants' motion to dismiss in which they conceded that RICO was inadequately pled against the government defendants. Because the district court did not rely on the plaintiffs' concession, but determine don the merits that plaintiffs' complaint was inadequate, any error in this respect was harmless.

it was allegedly don, and precisely who allegedly committed any of the asserted predicate acts."

Although plaintiffs now assert that they were not given an opportunity to amend their complaint, they did not request permission to amend their complaint before the district court prior to dismissal, even in the face of the government's clear contention in its motion to dismiss that the complaint was inadequate. Because the government had filed its answer, leave to amend had to be obtained. See Fed. R. Civ. P. 15(a). At no time, either before the district court or on appeal, have the plaintiffs indicated how they might amend their complaint to state a valid cause of action under RICO. Moreover, we cannot perceive any basis for a meritorious RICO claim in the circumstances of this case. Leave to amend is therefore not required.

AFFIRMED.

Filed: May 31, 1994

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD L. BOERS, et al..	)	
	)	No. 92-16508
Plaintiffs-Appellants,	)	
	)	DC No. CV-91-01068-WPC
v.	)	(District of Arizona)
	)	
UNITED STATES OF AMERICA, U.S. DEPARTMENT OF AGRICULTURE AND RICHARD SMILEY,	)	ORDER
Defendants-Appellees.	)	

Before: SCHROEDER, D.W. NELSON, and CANBY, Circuit Judges.

Plaintiff-Appellants' petition for rehearing has been considered and is denied.

Filed: December 7, 1993

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD L. BOERS, et al.,	)	
	)	No. 92-16508
Plaintiff-Appellant,	)	
	)	D.C. No. CV-91-01068-WPC
v.	)	
	)	
DEPT. OF AGRICULTURE, United States of America,	)	ORDER
	)	
	)	
Defendant-Appellee.	)	
	)	

Before: LAY, [6] THOMPSON and RYMER, Circuit Judges.

The records in this case discloses that a timely Rule 59(e) motion may be pending before the district court. -The judgment was entered on June 16, 1992, and the copy of the Rule 59(e) motion the appellants have provided in their excerpt of record (ER 131) bears the district court clerk's stamp indicating it was file din the district court on June 19, 1992. Excluding intervening

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6 The Hon. Donald P. Lay, Senior Circuit Judge, United States Court of Appeals of the Eighth Circuit, sitting by designation.

Saturdays and Sundays, this motion was timely filed, if indeed it was filed. Fed. R. Civ. P. 6(a). The government does not dispute that the motion was timely served.

There is no entry on the district court's docket sheet, however, to show that the motion was filed. This may have been an oversight, given the district court's "file" stamp on the coy of the motion in the appellants' except of record and the fact that the parties filed papers in the district court pertaining to the motion after what appears to have been its June 29, 1992 filing.

If there is a timely Rule 59(e) motion pending in the district court, this court lacks jurisdiction. Fed. R. App. P. 4(a)(4); Allah v. Superior Court, 871 F.2d 887, 889 (9th Dir. 1989). Accordingly, we remand this cause to the district court for it (1) to determine whether a timely Rule 59(e) motion is pending before it, and if so(2) to rule on that motion. Should the district court determine that the Rule 59(e) motion was not timely filed, or the motion is not pending before it, then this court would have jurisdiction of this appeal, and in that event this cause can be calendared before the next available merits panel, after this court

receives notice from the appellants of the district court's ruling. On the other hand, in the event the district court determines that a timely Rule 59(e) motion is pending before it, the notice of appeal filed August 13, 1992 would be ineffective and the appellants would have to file a new, timely notice of appeal after the district court rules on the pending motion. Id.

REMANDED to the district court. The parties are ordered to notify this court promptly upon the district court ruling on the matters heretofore mentioned.

Filed: January 6, 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HOWARD L. BOERS, et al.,	
	No. CIV-91-1068 PHX WPC
Plaintiff,	
	RULING UPON REMAND
v.	
DEPT. OF AGRICULTURE,	
Defendant.	

Pursuant to the Ninth Circuit Court of Appeals remand order, filed December 7, 1983, this Court has reviewed the file herein and has determined that no Rule 59(e) was filed in this matter. The Court notes, however, that a Rule 59(e) motion was filed in a companion case, case No. CIV-91-967 PHX. WPC. That motion was stricken on August 25, 1992.

DATED this 5 day of January, 1994.

/S/ Willaim P. Copple
WILLAIM P. COPPLE
UNITED STATES DISTRICT JUDGE

Filed: June 14, 1994

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-16508
CT/AG# Cv-91-01068-WPC

HOWARD L BOERS, et al.

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF AGRICULTURE, and RICHARD SMILEY

Defendants-Appellees

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Records from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that

the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 2, 1994.

PROOF OF SERVICE

I, THE UNDERSIGNED, HEREBY CERTIFY that, on this date, I sent a true and complete copy of the foregoing document to those persons designated below.

_____ mailed United States mail.

_____ sent overnight mail.

_____ sent facsimile transfer.

_____ hand delivered.

LINDA A. AKERS
RICHARD G. PATRICK
United States Attorney Office
4000 United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025

_____

Dated:

PROOF OF SERVICE

I, THE UNDERSIGNED, HEREBY CERTIFY that, on this date, I sent a true and complete copy of the foregoing document to those persons designated below.

_X_ mailed United States mail.

____ sent overnight mail.

____ sent facsimile transfer.

____ hand delivered.

Solicitor General
Department of Justice
Washington, D.C. 20530

LINDA A. AKERS
RICHARD G. PATRICK
United States Attorney Office
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230 North First Avenue
Phoenix, Arizona 85025

Steven W Shaw

Dated: 9-10-94

Supreme Court, U.S.
FILED
DEC 23 1994
OFFICE OF THE CLERK

No. 94-538

In the Supreme Court of the United States

OCTOBER TERM, 1994

HOWARD L. BOERS, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
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QUESTIONS PRESENTED

1. Whether the court of appeals correctly refused to toll the running of the two-year statute of limitations under the Federal Tort Claims Act, 28 U.S.C. 2401(b).

2. Whether the court of appeals correctly affirmed the dismissal of petitioners' Privacy Act complaint when the complaint was filed after the Privacy Act's limitations period had expired.

3. Whether the court of appeals correctly found that the district court did not abuse its discretion in dismissing petitioners' RICO complaint for failure to comply with the pleading requirements of Federal Rule of Civil Procedure 9(b).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-538

HOWARD L. BOERS, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 150-158) is unreported, but the decision is noted at 24 F.3d 244 (Table). The opinions of the district court (Pet. App. 125-132) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 160) was entered on May 2, 1994. A petition for rehearing was denied on May 31, 1994. Pet. App. 159. The petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners purchased farmland with the assistance of a Farmers Home Administration (FmHA) loan in 1980. After years of unprofitable dairy farming and ranching operations, the farm failed, and FmHA foreclosed on the loan in January, 1987. Petitioners attribute their financial difficulties to actions taken by various governmental employees and agencies. Governmental spraying of pesticides between 1958 and 1966 contaminated the alfalfa, which was grown on petitioners' land as feed for their dairy cows. Consequently, the milk produced by petitioners' dairy cows was also contaminated. Petitioners allege that FmHA knew, but failed to inform them before they bought the land, that the land had been sprayed with pesticides and that the land was infested with stem nematodes, which destroy alfalfa crops. Petitioners further allege that some of their FmHA loans were delayed or denied as a result of governmental negligence or intentional misconduct. Pet. App. 129-130, 151.

Petitioners filed an administrative tort claim in July, 1989, which was denied on January 24, 1991. They subsequently filed two lawsuits: a negligence action against the United States and the United States Department of Agriculture under the Federal Tort Claims Act (FTCA); and a separate complaint including Racketeer Influenced and Corrupt Organizations Act (RICO), Privacy Act, and intentional tort allegations against the United States, the United States Department of Agriculture and Richard Smiley, a former FmHA official. Pet. App. 151-152.[1]

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[1] The court of appeals characterized the intentional tort allegation, which petitioners pled as a breach of the duty of good faith and fair dealing, as an FTCA claim. Pet. App. 151-152.

The defendants answered both complaints in December, 1991, and then, in January, 1992, filed motions to dismiss, which were granted on June 15, 1992. The district court dismissed the FTCA negligence action because petitioners' administrative claim had been filed in July, 1989, more than two years after the last alleged predicate act in January, 1987, and beyond the FTCA's two-year limitations period. Pet. App. 129-132, 148-149. Petitioners did not appeal that dismissal. The intentional tort and Privacy Act claims were dismissed without discussion, apparently also on a statute of limitations basis. *Ibid.*[2] Finally, the district court dismissed the RICO cause of action on the ground that it failed to satisfy the particularity pleading requirement of Federal Rule of Civil Procedure 9(b). Pet. App. 125-128, 147.

Petitioners appealed the dismissal of the intentional tort/Privacy Act/RICO complaint to the Ninth Circuit, which affirmed the district court in an unpublished opinion. Pet. App. 150-158. The court of appeals rejected petitioners' argument that the running of the limitations period should have been tolled until September, 1987, when they learned, in the course of another lawsuit, of the causal connection between the FmHA's negligence in the handling of their loans and the failure of their farm. Petitioners identified their injuries as "the loss of their farm, and attendant financial and emotional

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[2] After its discussion of the statute of limitations in its Memorandum and Order dismissing the FTCA negligence action, the court wrote that "[t]hese conclusions apply with equal force and effect to a companion case pending before this Court, *Boers v. Dept. of Agriculture*, Civ. No. 91-1068 PHX-WPC [the RICO complaint which also contained the Privacy Act and intentional tort allegations]. The only remaining issue in the companion case is a RICO claim." Pet. App. 132. See also *id.* at 126.

setbacks." *Id.* at 156. The court found that petitioners were "well aware" of the three actual causes of those injuries well before September, 1987: DDE spraying; stem nematode infestation; and the lack of adequate and timely loan financing. *Ibid.* The court concluded that it was of no consequence that petitioners were unaware, prior to September, 1987, of the government's alleged contribution to that harm. In those circumstances, the court found that the statute of limitations was not tolled. Noting that the Privacy Act, like the FTCA, contains a two-year statute of limitations (Pet. App. 154), the court of appeals affirmed the dismissal of the Privacy Act claim on that basis.

The court of appeals also upheld the dismissal of petitioners' RICO claim for failure to comply with the pleading requirements of Rule 9(b), and rejected petitioners' argument that the district court erred in dismissing their complaint without allowing them an opportunity to amend it. Pet. App. 157-158. The court noted that petitioners had not sought leave to amend the complaint prior to the district court's dismissal, even in light of the government's motion to dismiss based upon the complaint's inadequacy. The court also noted that petitioners had not indicated, either before the district court or on appeal, any way in which the complaint might be amended to state a valid cause of action under RICO. Moreover, the court stated, "we cannot perceive any basis for a meritorious RICO claim in the circumstances of this case." *Id.* at 158.

ARGUMENT

1. The court of appeals correctly upheld the dismissal of the tort aspect of the complaint because the administrative tort claim was filed in July, 1989, more than two years after petitioners' claim accrued through

the loss of their farm in January, 1987. The district court lacked jurisdiction over the complaint under the FTCA's two-year statute of limitations. 28 U.S.C. 2401(b) (tort claim against the United States forever barred unless presented within two years after such claim accrues). A claim "accrues" when a plaintiff knows both the existence and the cause of an injury. *United States* v. *Kubrick*, 444 U.S. 111, 120 (1979). Because petitioners were aware, at the time they lost their farm, of the financial and emotional setbacks attendant upon that loss, as well as the actual causes of that loss (DDE, stem nematodes, and loan financing problems), the running of the limitations period was not tolled, notwithstanding petitioners' claim to have learned only later of the government's responsibility for their injuries. See *Kubrick*, 444 U.S. at 122; *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984) ("Discovery of the cause of one's injury * * * does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered.").

2. The court of appeals properly sustained the trial court's dismissal of the Privacy Act cause of action against FmHA as time-barred. The complaint did not allege that the cause of action arose or was discovered within the two-year period preceding the filing of the complaint in July, 1991. See 5 U.S.C. 552a(g)(5). In addition, the court of appeals found that the complaint alleged no separate ascertainable Privacy Act injuries. Pet. App. 156-157. Dismissal of the complaint as to the individual defendant Richard Smiley was warranted in that only an "agency" is a proper party defendant in a Privacy Act action. 5 U.S.C. 552a(g)(1); *Bruce* v. *United States*, 621 F.2d 914, 916 n.2 (8th Cir. 1980).

3. The court of appeals did not err in upholding the dismissal of the RICO cause of action based on petitioners' failure to comply with Federal Rule of Civil Procedure 9(b), which requires that the circumstances constituting fraud be stated with particularity in a complaint.[3] That requirement has been interpreted to mean that the plaintiff must state the time, place, and specific content of the false representations, as well as the identities of the parties to the misrepresentation. *Schreiber Distributing Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1400-1401 (9th Cir. 1986); *Semegen* v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The district court found that none of these criteria had been met: "Based on the complaint, it is impossible to define what was allegedly done, when it was allegedly done, how it was allegedly done and precisely who allegedly committed any of the asserted predicate acts." Pet. App. 127.

While Federal Rule of Civil Procedure 15(a) provides that leave to amend a complaint shall be freely given when justice so requires,[4] the decision to grant or deny such leave is within the discretion of the district court. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). In exercising its discretion, the district court may consider such

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[3] Rule 9(b) provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

[4] Rule 15(a) provides, in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

factors as undue delay; bad faith or dilatory motive on the part of the movant; repeated failure to cure deficiencies by amendments previously allowed; undue prejudice to the opposing party; and futility of the proposed amendment. *Ibid.*; *Moore* v. *Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

Here, the court of appeals noted that petitioners "did not request permission to amend their complaint before the district court prior to dismissal, even in the face of the government's clear contention in its motion to dismiss that the complaint was inadequate." Pet. App. 158. In the absence of such a request, the district court did not abuse its discretion by failing to grant petitioners leave to amend *sua sponte* prior to dismissing the complaints. See *Kowal* v. *MCI Communications Corp.*, 16 F.3d 1271, 1279 (D.C. Cir. 1994) (footnote omitted) ("Plaintiffs here failed to move to amend their complaint, and it 'could hardly have been an abuse of discretion for the District Court not to have afforded [plaintiffs] such leave *sua sponte*.'").[5] Accord *Black* v. *Payne*, 591 F.2d 83, 89 (9th Cir.) (where case below was decided on a motion to dismiss and appellant asked for leave to amend his complaint for the first time on appeal, "the request to remand with instructions to permit amendment c[ame] too late"), cert. denied, 444 U.S. 867, 985 (1979).

Even if, as petitioners assert (Pet. 8-9), they requested leave to amend after the court dismissed their complaint,

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[5] In *Kowal*, the plaintiffs had thirteen months between the time the defendants filed a motion to dismiss and the time the judge dismissed the complaint, during which they could have requested leave to amend. Here, petitioners had at least five months between the motion to dismiss and the entry of judgment by the district court dismissing the complaint in which to request leave to amend.

the district court did not abuse its discretion in denying or declining to consider such a request. As noted above, both undue delay and prejudice to the opposing party are recognized bases on which to deny a motion to amend. Petitioners' unexplained failure to request leave to amend their complaint, after learning of the government's basis for requesting dismissal and prior to the time the court ruled on the motion, constituted undue delay.

In any event, the court of appeals noted that petitioners had not indicated how they might amend their complaint to state a valid RICO cause of action. Pet. App. 158. The court of appeals also independently determined that the deficiencies in the complaint could not be cured in that the court could not "perceive any basis for a meritorious RICO claim in the circumstances of this case." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ROBERT S. GREENSPAN
DOUGLAS B. JORDAN
Attorneys

DECEMBER 1994